In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-881

In the Matter of
THE FIRST BANK AND TRUST COMPANY,
PETITIONER

v.

ROBERT BLOOM, as he is ACTING COMPTROLLER OF THE CURRENCY OF THE UNITED STATES and MIDDLESEX BANK, (N.A.),
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on September 27, 1976 in the above entitled matter.

Opinions Below

This matter was first decided by a decision of the United States District Court on May 13, 1974 which was not reported. A copy of that decision appears in Appendix A at p. 17. That decision was then reversed by the United States Court of Appeals for the First Circuit on January 3, 1975 and is reported at 509 F.2d 663 (1st Cir. 1975). That

decision appears in Appendix B at p. 24. The decision of the United States District Court on remand, which was rendered on April 12, 1976 and was not reported, appears in Appendix C at p. 30. The decision of the United States Court of Appeals for the First Circuit rendered on September 27, 1976 was not reported; a copy of that decision appears in Appendix D at p. 34. The initial approval of the Comptroller of the Currency on April 3, 1973 was made by completion of a form by signing of his name next to a blank which was preprinted "Approved"; the supplemental opinion of the Comptroller of the Currency issued on April 24, 1975 appears in Appendix E at p. 38.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was made and entered on September 27, 1976. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). This action was originally commenced in Federal Court pursuant to 28 U.S.C. §1331(a).

Questions Presented

I. Whether An Opinion of the Comptroller of the Currency Issued After a Judgment of the Court of Appeals Holding That the Original Administrative Record Was Insufficient For Judicial Review Provides a Satisfactory Explanation of the Original Administrative Action Where the Opinion Is Subsequently Issued by One Who Took No Part in the Initial Determination and Is Based Solely on the Original Record.

II. Whether a Subsequent Opinion By An Administrative Agency Merely Based Upon a Defective Administrative Record Can Cure That Record.

Statutes Involved

The pertinent provisions of 12 U.S.C. §36(c) and Massachusetts General Laws C.172, §11(a), which is incorporated in the U.S. Code by reference, are set forth in Appendix F at p. 42. The applicable provisions of 12 C.F.R. appear in Appendix F at p. 43.

Statement

1. *Parties*

Petitioner, The First Bank and Trust Company, (hereinafter "First Bank") is a Massachusetts Trust Company with a principal place of business in Chelmsford, Massachusetts. The respondents are Robert Bloom, Acting Comptroller of the Currency, and Middlesex Bank, N.A., (hereinafter "Middlesex"), a national bank which had, at the commencement of this action, twenty-eight branches in Middlesex County, Massachusetts.

2. *Background*

The present controversy arises out of an application by a national bank to establish a branch bank and the subsequent activities of the Office of the Comptroller of the Currency in approving that application. On December 6, 1972, Middlesex filed an application with the Regional Administrator of National Banks for the First Bank District requesting the permission of the Comptroller of the Currency to establish a branch in the Purity Supreme Shopping Center in Chelmsford, Massachusetts.

In conformity with applicable law, Middlesex published the required legal notice of its application to establish this

branch and First Bank requested, pursuant to the regulations of the Comptroller, that a public hearing be held concerning the application. 12 C.F.R. Part 5.

The Regional Administrator of National Banks scheduled a public hearing for January 29, 1973 and requested that an examination of the facts be made by a National Bank Examiner, who rendered a written report. Thereafter, on January 29, 1973, a public hearing was conducted before the designee of the Comptroller, the Regional Administrator of National Banks for the First National Bank Region, concerning the application of Middlesex Bank to establish a branch. At the hearing, Middlesex Bank presented evidence in support of its application; First Bank presented evidence in protest and several other local banks appeared and expressed their opposition to the application. The transcript of the proceedings and the public file established pursuant to 12 C.F.R. Part 5 were thereafter transmitted to the Office of the Comptroller. After review by his staff, on April 14, 1973, a decision was rendered by the completion of a preprinted form marked "Approved" with no indication of the basis of the decision. First Bank commenced the present proceedings on May 1, 1973, alleging that the decision of the Comptroller was arbitrary and capricious in (1) not setting forth the standard under which the decision was made and (2) failing to demonstrate that the facilities in the Town of Chelmsford were inadequate for the public convenience as required under applicable Massachusetts law.

The defendants moved to dismiss or for summary judgment and filed affidavits attacking the entire administrative record on the application. Following a hearing on the motion, The District Court granted summary judgment for the defendants. In his memorandum issued on May 13, 1974, the judge stated that:

> "upon consideration of the entire administrative record, the court believes there is sufficient explanation for the administrative action taken that summary judgment is proper." (Appendix A, p. 21)

On appeal, the Court of Appeals reversed the district court judgment and remanded the case for further proceedings. (Appendix B at p. 24). The Court of Appeals agreed with the District Court that the appropriate standard for review defined by the Supreme Court in *Camp* v. *Pitts,* 411 U.S. 138 (1973) is found in 5 U.S.C. §706(2) (A): the appropriate measure is whether the Comptroller's decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *First Bank and Trust Company* v. *Smith,* 509 F.2d 663, 665 (1st Cir. 1975). The law to be applied is 12 U.S.C. § 36 requiring that national bank branches be permitted only where state banks would be permitted to open branches under state law. The relevant state standard to be applied by the Comptroller is Mass. Gen. Laws, C.172, §11 which permits establishment of branch offices only in areas in which the existing facilities are inadequate for the public convenience. The court found that the appropriate standard for judicial review is whether or not the Comptroller took this Massachusetts statutory standard into account in rendering his approval of the application. *First Bank and Trust Company* v. *Smith,* 509 F.2d 663, 665 (1st Cir. 1975).

The court agreed that under *Camp* v. *Pitts,* 411 U.S. 138 (1973) there was no duty on the part of the Comptroller to make formal findings of fact and that the review must be based on the entire original administrative record before the Comptroller. *First Bank and Trust Company* v. *Smith,* 509 F.2d 663, 665 (1sf Cir. 1975). The record before the court must contain sufficient explanation of the agency's decision so as not to frustrate judicial review. The Court

of Appeals then remanded the case to the district court with instructions to follow the procedure outlined in *Camp* v. *Pitts* to obtain "such additional explanation of the reasons for the [Comptroller's] decision as may prove necessary" (411 U.S. 138, 143 (1973)) and to determine from the Comptroller "whether or not the Comptroller took into account the relevant state legal standard". *First Bank and Trust Company* v. *Smith,* 509 F.2d 663, 666 (1st Cir. 1975).

First Bank then attempted to take the depositions of four members of the Comptroller's staff who, upon the basis of the original administrative record, had been involved in the determination, in order to find out whether they had in fact understood and applied the Massachusetts standard. The Comptroller sought and obtained a protective order on the ground that he was writing an opinion which would satisfy the Court of Appeals' mandate. The decision of the Court of Appeals was rendered on January 3, 1975; over three months later, on April 24, 1975, the Comptroller issued his opinion. (Appendix E at p. 38). Upon issuance of the opinion the Comptroller again moved for summary judgment. The Comptroller explained the agency approval by reference to the alleged standard procedure of the agency that:

> "in passing on branch, charter and similar applications, the Comptroller of the Currency has, as a supervisory matter, always considered whether such applications will serve and fulfill a legitimate banking need of a community or whether the existing facilities in the community adequately meet the public needs and convenience, thereby negating need for another facility in the area—whether or not such criterion is imposed by state statute upon state banking authorities in the particular state involved." (Appendix E, p. 39)

Arguing that this statement was an insufficient explanation of the basis of approval used on the review of Middlesex's application, First Bank moved to vacate the protective order and for leave to take the noticed depositions. The District Court, while admitting that "the issue is not entirely free from doubt" was satisfied that the record together with the new opinion contained sufficient explanation of the Comptroller's decision and that no issue of material fact remained for his determination. The court therefore denied the First Bank's motion for leave to take depositions and granted summary judgment for the defendants. First Bank again appealed to the Court of Appeals which determined that the supplemental opinion filed by the Comptroller of the Currency was sufficient to establish that the decision was in accordance with law and affirmed the second summary judgment. (Appendix D, p. 34)

Reason for Granting the Writ

The decision of the Court of Appeals with regard to the federal question of the onus of an administrative agency adequately to explain the basis of its administrative action is in conflict with the decisions of the Supreme Court of the United States in *Camp* v. *Pitts,* 411 U.S. 138 (1973) and *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971). In violation of the standards set forth in those decisions, the Court of Appeals has permitted a determination made upon an administrative record previously found to be inadequate, to be cured by an ex post facto rationalization of that determination without explication.

Argument

1. *Background*

The Court of Appeals concluded that the supplementation of the Administrative Record by an opinion of the Comptroller provided a sufficient explanation of the admin-

istrative determination to conclude that the initial determination was in accordance with law. This conclusion is a license to the Comptroller to continue to avoid appropriate consideration of state banking laws in passing upon applications for national bank branches. The history of the Comptroller's disregard for state branching law is thoroughly established by the determinations of this and other federal courts.

The standard which governs whether or not an application for a branch facility should have been granted in this matter is found in Mass. G.L.C. 172, §11(a). Incorporation of state law into the national banking system is accomplished through the provisions of 12 U.S.C., §36(c) and there is no question that the Comptroller, in determining whether or not to permit the establishment of a branch office, must look to the appropriate provisions of state law. *First National Bank of Logan* v. *Walker Bank and Trust Company,* 385 U.S. 252 (1966); *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969). As has been observed, however, the Comptroller has continually resisted this requirement. In *Clermont National Bank* v. *Citizens Bank,* 329 F.Supp. 1331 (S.D., Ohio, 1971), for example, the court said:

> "The Comptroller has argued in case after case of recent years and months, that his approval of authority to a national bank to operate a branch may be questioned only on a basis on which his approval to operate a national bank would be . . . . On at least two occasions the Supreme Court has said as clearly as can be that all the tests and standards provided by state law must be regarded by and are applicable to the Comptroller in any decision of his whether or not to authorize a branch of a national bank. . . . While that clearly is the law, the Comptroller simply will not agree with it. He has continued to maintain it's not the law in one after the other federal, district and appellate courts." 329 F.Supp. 1335.

The present matter is closely aligned to the case of *First National Bank* v. *Wachovia Bank and Trust Co.,* 325 F. Supp. 523 (M.D. N.C. 1971), *aff'd* per curiam 448 F.2d 637 (4th Cir. 1971). See also *The Bank of New Bern* v. *Wachovia Bank and Trust Company,* 353 F.Supp. 643 (E.D. N.C. 1972); *First National Bank of Fayetteville* v. *Smith,* 365 F.Supp. 898 (W.D. Ark. 1973). *Clermont National Bank* was decided during an era when the Comptroller was still rendering written decisions. See *Clermont, supra* at 1336.

In *Wachovia,* the Comptroller declined to make a finding as to whether the "needs and convenience of the community" would be served by the proposed branch as required under state law in question but found:

> "Protestants have chosen to emphasize their arguments by referring to the portions of the North Carolina branching law which required the State Commissioner of Banks, before approving a branch application, to find that the branch '. . . will meet the needs and promote the convenience of the community . . .' and that '. . . the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch . . .' Section 53-62(b), N.C. Gen. Stat. In effect, protestants urge that Wachovia's application does not meet these criteria and that the Comptroller thus is required to disprove it.
>
> "The Comptroller therefore *declines* here . . . to make the findings required of the State Banking Commissioner by Section 53-62(b) of the North Carolina General Statutes". (Emphasis supplied by the Court.) 325 F.Supp. at 524, 529.

The failure of the Comptroller to reach a determination with reference to the applicable state law standard under Massachusetts law is not here as patent as in the cases noted above, but it is a latent and insidious characteristic of the determination reached in this matter which has continued in similar matters, *see, e.g., Hempstead Bank* v. *James E. Smith,* 540 F.2d 57 (2nd Cir. 1976), and will continue unless the decision of the Court of Appeals is reversed.

2. *Record In This Matter*

The critical question in the Middlesex application is whether or not the application was approved with reference to the question of whether banking facilities in the Town of Chelmsford were inadequate for the public convenience.

From the filed Administrative Record a form entitled "Supplemental Information Developed in Relation to An Application . . ." appears to be the final step in the original administrative process in the Comptroller's office. This three page form, which includes the signed approval of the Comptroller, contains what appears to be the distillate views of the individuals on the Comptroller's staff charged with reviewing and passing upon the application (those individuals sought to be deposed by petitioner after the first appeal) as well as the other information which the Comptroller presumably had deemed pertinent in reaching a determination of whether or not to grant a branch application. Item 2 of this form reads:

> "2. *Legality — Capital, State Law, etc.* Capital and Surplus sufficient to meet requirements of both State Law and Federal Statutes."

The state law of Massachusetts does not have any capital requirements for the establishment of branch offices. The failure of the entry under this blank to read "State law requires banking facilities in the town in question to be inadequate for public convenience" or words of similar import raised the strongest questions as to whether or not the requisites of state law were considered in passing upon this application. The form proceeds on the second page to note the views of Stephen J. Conners, the National Bank Examiner assigned to review the application. Mr. Conners in noting the unfavorable factors in connection with the application among other items states, "*The town has sufficient banking facilities.* Future growth prospects for the town appear limited" (Emphasis supplied.) The views of Mr. Gridley, the Regional Comptroller of the Currency, stress that the branch will "enable the applicant to compete for their share of additional business". Mr. Brenzinki, the Director, Bank Organization Division, states, "[d]espite strong opposition, it becomes clear that applicant has sufficient business at stake in this town to justify opening outlet" and Mr. Blanchard, Deputy Comptroller of the Currency, noted the proposed branch is intended to provide better service to present customers by relieving congestion at another office four miles away. Finally, returning to Mr. Conners' favorable comments, he states:

> "The applicant bank has the management and asset capacity to support the proposed branch. The bank has a substantial amount of business in Chelmsford. The required investment in fixed assets is minimal."

The fact that Middlesex had sufficient assets or that minimal investment was required had no bearing on whether banking facilities in the Town of Chelmsford are inadequate for the public convenience. The fact that the bank has a substantial amount of business in Chelmsford does not directly speak to whether facilities in Chelmsford are inadequate. Between 1969 and the date of the application,

three new banking outlets opened in the Town of Chelmsford and in 1972 Massachusetts Savings Banks were determined to be "entitled to permit . . . depositors to make withdrawals by means of a withdrawal order in negotiable form, which order may be employed in the withdrawal of bank deposits." *Consumers Savings Bank* v. *Commissioner of Banks,* 361 Mass. 717, 282 N.E. 2d 416 (1972). As of the date of the application, there were three Massachusetts Savings Banks in Chelmsford. It is small wonder that the Comptroller's staff felt that a branch for Middlesex might protect its existing customers, since existing facilities had so expanded as to threaten this business.

Accompanying the three page form "Supplemental Information Developed in Relation to an Application . . ." are additional forms. The first is the Report of Investigation of a Branch Application. This form appears primarily to have been prepared by Stephen J. Conners, the National Bank Examiner, and is followed by a form entitled "Confidential Memorandum to the Comptroller of the Currency on a Branch Application . ." The second form includes a variety of detailed information concerning the proposed branch. However, when it comes to the question of state law, the only two questions posed relate to restrictions on location and whether state law limits branch powers. The question as to the appropriate standard for approval under state law is never asked. Finally, at the end of the third form, is the following conclusion:

> "The bank has sufficient business in the community to warrant the branch. *The overbanked condition must be considered;* however, all competing institutions are well established with adequate assets and capital bases sufficient to withstand any potential adverse effects of the proposed branch." (Emphasis supplied.)

This administrative record, after having been determined by the Court of Appeals to be inadequate was found to have been cured by the opinion issued by the Comptroller of April 24, 1975.

3. *Reasons Why New Opinion Was Not Adequate.*

The sequential framework of the issuance of the new opinion is significant in judging whether it satisfied the dictates of this Court in *Overton Park, supra* and *Camp* v. *Pitts, supra.* The decision of the Court of Appeals in the first appeal was issued on January 3, 1975 and upon issuance of the mandate on January 24, 1976, First Bank noticed the deposition of four of the Comptroller's staff, who, on the basis of the original administrative record, had been chiefly responsible for the determination to approve the branch application. On February 20, 1975, the Comptroller moved for and obtained protective orders staying the taking of these depositions. Not until April 24, 1975, almost four months after the first decision of the Court of Appeals, did the Comptroller issue his opinion. However, the opinion submitted was merely a "post hoc rationalization" (*Citizens To Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 420, (1971)) of the Comptroller's decision and does not in fact demonstrate that the Massachusetts statutory standard was originally considered by the Comptroller in reviewing the application. A statement of the agency's standard procedure does not establish that the acting Comptroller or his subordinates understood and applied the Massachusetts statutory standard, requiring a showing of inadequacy before consideration of any other factors.

The Comptroller added no new information to the record, and because he did not hold the office when the original approval was given, he had no first-hand knowledge of what standards were applied, and his opinion does not

show that he made any inquiry to ascertain what was in fact considered. This Court has held that administrative action must be reviewed by what was done, not what might have been done. Such action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its [decision] .... There must be such a responsible finding." *Securities and Exchange Commission* v. *Chenery Corporation,* 317 U.S. 80, 94 (1943). In explaining his predecessor's approval, the Comptroller merely looked at the record, the same record which the Court of Appeals held was insufficient as a matter of law for a review of whether or not the Comptroller's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and found that in his opinion it was sufficient.

The Court of Appeals in the second appeal was persuaded that the assertion that the relevant state standard was considered was sufficient to establish that the decision of the Comptroller was in accordance with law. This determination is not justified from a fair reading of the Comptroller's decision. After setting forth the background the Comptroller first states what he did in order to comply with the Court of Appeals decision. He ". . . re-examined the record on the application . . ." and reaffirmed the approval. He then states that in passing on branch applications that it is the practice of the Comptroller always to consider whether the existing facilities in the community adequately meet the public needs and convenience whether or not such criterion is imposed by state statute and that such factor was considered in the present application. The Comptroller then makes reference to certain portions of the original administrative record to support this conclusion and soundly demonstrates his lack of knowledge of the

original record by noting one of the strong demonstrations of the inadequacy of existing facilities is that First Bank was "the only existing commercial facility in Chelmsford" when in fact the original record showed that there were four commercial banking outlets of two banks in Chelmsford at the time. Having made a substantial factual error in direct conflict with the original record, the Comptroller ended his opinion by finding, "that the existing commercial banking facility in the applicant's service area is inadequate for the public convenience." (Appendix E, p. 40) Thus, the Comptroller's opinion is inadequate for three separate and distinct reasons:

First, it does not in any way provide an explanation of the original agency determination.

Second, on its face it is based on material factual conclusions which are at variance with the original record.

Third, it is not in fact an explanation of the reason or basis for the original agency determination but instead a new opinion based upon the old record which is not what is required under *Camp* v. *Pitts, supra.*

4. *Conflict With Decisions of This Court*

The decisions of this Court in *Camp* v. *Pitts, supra* and *Citizens to Preserve Overton Park, supra,* are direct and clear. In order for a court to judge whether an administrative decision was made in accordance with law, the basis of that decision must be fairly apparent. Where the original record is defective, the basis for a decision may be ascertained either through affidavits or testimony. The question, therefore, is whether, once a record has been found to be insufficient, it can be cured by an opinion which on its face is factually inaccurate, not based on knowledge of actual events at the time of rendering the original decision and is a mere conclusion that the law was followed.

Such a result is not in conformity with this Court's previous decisions and undermines the policy of assuring that administrative decisions be reached in accordance with law. The requirement is, of course, not that actual findings of fact be issued or a conclusion be reached in the identical words of the state statute. The requirement is, however, that the actual basis of the original decision be shown, and if not apparent in the basis of the original record, some fair explanation of what was in fact considered be given. The inadequacy of an original record is not cured by an opinion which fails to explain what was in fact originally considered and which is based on out-dated, stale, and misunderstood information.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a *writ of certiorari* should be granted to review the judgment of the United States Court of Appeals for the First Circuit rendered September 27, 1976.

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APPENDIX A

United States District Court
District of Massachusetts

Civil Action No. 73-1355-M

The First Bank and Trust Company,
plaintiff,
v.
James E. Smith, Comptroller of the Currency of the United States,
and
Middlesex Bank, N.A.,
defendants.

MEMORANDUM
May 13, 1974

Murray, D.J. This action came on to be heard on the motions of defendants for summary judgment. The action was brought pursuant to 12 U.S.C. § 36 and jurisdiction is properly conferred upon this court under 28 U.S.C. § 1331(a). Plaintiff has asked this court to reverse the decision of the Acting Comptroller of the Currency (Comptroller), dated April 20, 1973, in which permission was granted to defendant Middlesex Bank, N.A. (Middlesex) to establish a branch bank at the Purity-Chelmsford Shopping Center in Chelmsford.

The Comptroller and Middlesex have moved for summary judgment on the following grounds: a) there currently exists no genuine issue of material fact in doubt, b) the court's scope of review is limited to a determination as to whether the decision of the Comptroller was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and c) because the Comptroller applied the

correct standard under 12 U.S.C. § 36[1] and Mass. Gen. Laws ch. 172, § 11,[2] and the evidence as presented in the administrative record supports a conclusion that banking facilities in the Town of Chelmsford were inadequate for the public convenience, there are no grounds for reversal of the decision of the Comptroller.

Plaintiff has denied in the first instance that the action is ripe for summary judgment since in its view it is impossible to ascertain the grounds for the decision of the Comptroller. It is therefore the contention of plaintiff that a material question of fact does remain: ascertainment of the basis of the decision to grant permission to Middlesex to open a branch bank. If in fact the basis of the decision is not ascertainable on the record, then summary judgment would clearly not be appropriate.

Plaintiff next argues that if the court should conclude that no genuine issue of material fact exists, then summary judgment for the plaintiff is proper on the ground that the decision was arbitrary, capricious, an abuse of discretion and not in accordance with law, for either of two reasons: (a) the Comptroller failed to apply the correct standard in reaching his decision, and (b) even if the correct standard was applied, the Comptroller could not have reasonably reached the decision on the administrative record. Plaintiff also argues that since the Board of Bank

[1] In pertinent part, 12 U.S.C. § 36(e) provides that "[a] national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks".

[2] Mass. Gen. Laws ch. 172, § 11 provides in material part that "[a]fter such notice and hearing as the board may prescribe, . . . a trust company may, with the approval of the board, establish and operate one or more branch offices . . . in any other city or town in the same county . . . having banking facilities which, in the opinion of the board, are inadequate for the public convenience".

Incorporation of the Commonwealth denied to another bank approval of the establishment of a branch in Chelmsford on the ground that existing banking facilities were not insufficient to serve the public convenience, the Comptroller is thereby barred from reaching a contrary conclusion at about the same time in the case of Middlesex.

I. The Propriety of Summary Judgment at This Juncture

In light of the decisions of the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971) and *Camp* v. *Pitts,* 411 U.S. 138 (1973), and the interpretations of these cases by lower courts, it is quite clear that the scope of review in this case is set forth in 5 U.S.C. § 706(2)(A), and is thereby limited to the issue of whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". There is no dispute among the parties that the Comptroller was not required to make any findings of fact in this case, and it is not clear from the holdings of the cited cases and others that review is to be based on the full administrative record that was before the Comptroller at the time he made his decision. The entire record which was compiled has been made available to the court in this case. However, it is arguable that summary judgment ought not to be granted at this point, and that either affidavits or further testimony should be elicited from the Comptroller so as to make possible effective judicial review even under the narrow standards of review of section 706(2)(A). As was pointed out in *Citizens to Preserve Overton Park:*

> since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

> The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

401 U.S. at 420.

In *Camp* v. *Pitts*, 411 U.S. 138 (1973), an action similar to the instant case, it was stated that:

> If . . . there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary. . . . [I]n the present case there was contemporaneous explanation of the agency decision. The explanation may have been curt, but it surely indicated the determinative reason for the final action taken . . . The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. . . . It is in this context that the Court of Appeals should determine whether and to what extent, in the light of the administrative record, further explanation is necessary to a proper assessment of the agency's decision.

Id. at 142-43.

The holding in *Camp* v. *Pitts, supra*, has been interpreted to mean that unless there is "any such paucity of administrative explanation as would frustrate effective judicial review of the Comptroller's action" the decision of the reviewing court must rest upon the full administrative record, and that where "findings of fact, rendered contemporaneously with the concomitant administrative decision, are subsequently available, a reviewing court may not require the agency officials who participated in that decision to give testimony explaining their action unless there has been a strong showing of bad faith or improper behavior." *Bank of Commerce of Laredo* v. *City National Bank of Laredo*, 484 F.2d 284, 288 (5th Cir. 1973).

In light of these holdings, the views of other courts concerning *post-hoc* rationalizations of agency decisions, *cf. Bradley* v. *Weinberger*, 483 F.2d 410, 415 (1st Cir. 1973), and upon consideration of the entire administrative record, the court believes there is sufficient explanation for the administrative action taken such that summary judgment is proper. There may exist some confusion as to the reasoning process employed by the Comptroller in reaching his decision, but there is sufficient explanation in the administrative record, particularly the reports of the Comptroller's subordinates, to obviate the need for further explanation by the Comptroller of the mental processes involved in his grant of permission to Middlesex.[3]

II. Summary Judgment

Even though the case, in the court's view, is ripe for summary judgment, it still remains for the court to determine if the decision of the Comptroller was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. As the opinion in *Citizens to Preserve*

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[3] *E.g.*, Comptroller of the Currency Administrative File, Application of Middlesex Bank, N.A. Burlington, Massachusetts, to establish a branch in Purity-Chelmsford Shopping Center, Boston Road and Summer Street, Chelmsford, Middlesex County, Massachusetts, at 8, 9, 11, 12, 13, 15, 16, 19, 20-24. (Exhibit A)

Overton Park v. *Volpe, supra,* held, that determination involves ascertaining whether the agency official (in this case, the Comptroller) properly construed his authority as being limited in a certain manner by the statute authorizing his action, that is whether he acted within the scope of his authority, and whether the action taken was justifiable under the applicable standard.

A survey and analysis of the Administrative Record will reflect the fact that the Comptroller did consider and apply the relevant state statute, Mass. Gen. Laws ch. 172, § 11, and that his approval of the branch bank for Chelmsford was for a town referred to in evidence as having "banking facilities . . . inadequate for the public convenience." Mass. Gen. Laws ch. 172, § 11. The Comptroller must be allowed discretion in the interpretation of words of a state statute which are susceptible of several reasonable interpretations and which have not received an authoritative interpretation from the state court, *cf. Investment Co. Institute* v. *Camp.*, 401 U.S. 617, 626 (1971); *First National Bank of Southaven* v. *Camp.*, 471 F.2d 1322, 1326-27 (5th Cir. 1973); *Commonwealth of Va. ex rel. State Corp. Com'n* v. *Camp.*, 333 F. Supp. 847 (E.D. Va. 1971). Merely because the Comptroller may have considered several criteria other than those set out in Mass. Gen. Laws ch. 172, § 11, *e.g.*, availability of capital and surplus, does not require the conclusion that he did not act within the scope of his authority. There is ample support in the administrative record before the court to reject the contentions of plaintiff that the requirements of the state statute were ignored.[4]

This court might well have reached, on the basis of the evidence presented in the administrative record, a conclusion different from the one reached by the Comptroller on the issue of whether the banking facilities in Chelmsford were inadequate for the public convenience, but the conclusion is not required that the decision of the Comptroller is therefore arbitrary, capricious or an abuse of discretion.

[4] *Ibid.*

Finally, the Court has considered the contention of the plaintiff that the Comptroller was barred from approving this application as a result of the actions of the Board of Bank Incorporation of the Commonwealth in disapproving in January of 1972 and April of 1973 applications of the Lexington Trust Company to establish a branch office in Chelmsford Center. The statute permitting the Comptroller to establish branches of national banks, 12 U.S.C. § 36, requires him to look to the law of the state in which the branch is sought to be established so as to determine its eligibility. The statute is only intended to place national and state banks on a competitive equality and does not mean that the interpretations and opinions of state banking authorities are binding upon federal authorities. *See, e.g., First National Bank of Fairbanks* v. *Camp.*, 465 F.2d 586 (D.C. Cir. 1972). Federal authorities must apply the law of the relevant state but are also required independently to exercise their statutory grant of discretion. It is therefore not true that the Comptroller was barred from approving this application of Middlesex.

Accordingly, in light of the findings of the court that no genuine issue of material fact remains and that the actions of the Comptroller were neither arbitrary, capricious, nor an abuse of discretion and were in accordance with law, summary judgment shall be entered on behalf of the defendants.

(s) FRANK J. MURRAY
United States District Judge

Dated: May 13, 1974

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 74-1263

THE FIRST BANK AND TRUST COMPANY,

PLAINTIFF, APPELLANT,

v.

JAMES E. SMITH, COMPTROLLER, ETC., ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Michael T. Putziger, with whom *Roche, Carens & DiGiacomo* was on brief, for appellants.

William A. Waldron, with whom *Alan L. Lefkowitz*, *Paul E. Clifford*, and *Gaston Snow & Ely Bartlett* were on brief, for Middlesex Bank, N.A., appellee.

Morton Hollander, Attorney, Department of Justice, with whom *Carl A. Hills*, Assistant Attorney General, *James N. Gabriel*, United States Attorney, and *Leonard Schaitman*, *Attorney*, Department of Justice, were on brief, for James E. Smith, Comptroller of the Currency of the United States, appellee.

January 3, 1975

CAMPBELL, *Circuit Judge*. This appeal requires us to review a decision by the Acting Comptroller of the Currency of the United States approving an application for permission to establish a branch bank in Chelmsford, Massachusetts. The district court, on the basis of the administrative record and an affidavit supplied by the applicant, granted

summary judgment for the defendant Comptroller. Fed. R. Civ. P. 56(b). We vacate and remand for further proceedings.

Defendant-Appellee, Middlesex Bank, N.A., is a national bank operating under the provisions of 12 U.S.C. § 12 *et seq.* It maintains 28 branch offices in Middlesex County. Plaintiff-Appellant, The First Bank and Trust Company (First Bank) is a Massachusetts Trust Company operating as a commercial bank under M.G.L. c. 172. It has its principal office in Chelmsford, Massachusetts, and four branch offices in surrounding towns.

On December 6, 1972, Middlesex Bank filed an application with the Regional Administrator of National Banks for the First Bank Region requesting permission from the Comptroller of the Currency to establish a branch office in the Purity Supreme Shopping Center in Chelmsford, Massachusetts. Pursuant to 12 C.F.R. § 5.2(b) Middlesex Bank published legal notice of its application, and First Bank requested that a hearing on the application be held in accordance with 12 C.F.R. §§ 5.4-5.10.

Acting by designation of the Comptroller, the Regional Administrator held a public hearing, having first requested an investigation into the facts by a National Bank Examiner who rendered a written report. At the hearing Middlesex Bank presented evidence to support its application, First Bank presented opposing evidence, and several other local banks appeared in opposition. The Regional Administrator, without comment, then transmitted the file established pursuant to 12 C.F.R. § 5.3, including a transcript of the hearing, to the Comptroller who, after various levels of staff review, approved the application without stating his reasons. First Bank thereupon brought this action in the district court, 28 U.S.C. § 1331(a), challenging the Comptroller's action as violative of his statutory duty and authority and seeking declaratory and injunctive relief.

Appellant argues that the Comptroller failed to take into account a statutory requirement that he approve new branches for national banks only "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question" and "subject to the restrictions as to location imposed by the law of the State on State banks."[1] The statute has been held to incorporate by reference state laws governing the establishment of branch banks, *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Its purpose is to ensure "competitive equality" so that national banks may not overwhelm and displace a state's own banks. By requiring national banks to adhere to the same restrictions on branching, Congress intended to prevent them from enjoying an unfair advantage over state banks. *Walker Bank, supra; First National Bank* v. *Dickinson,* 396 U.S. 122 (1969). In passing on each branch application, the Comptroller "is to weigh [it] against the standard imposed by the statute law of the state, and to deny the application if that standard is not met." *First National Bank of Fairbanks* v. *Camp,* 465 F.2d 586, 597 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 1124 (1973). The statute law of Massachusetts provides that state banks may establish branch offices only if the Board of Bank Incorporation, a state agency, finds that a city's or town's present banking facilities are "inadequate for the public convenience." M.G.L. c. 172, § 11. It is this standard, incorporated by reference in the federal legislation, which appellant contends was ignored.

[1] 12 U.S.C. § 36(c)(2) provides that

"[a] national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

Our review of the Comptroller's action is under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Neither the National Bank Act nor the APA requires the Comptroller, before approving a branch application, to hold a hearing on the record or to make formal findings. *Cf. Camp* v. *Pitts,* 411 U.S. 138, 140-42 (1972). Thus, the appropriate measure is simply whether the Comptroller's decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). The district court so recognized, stating correctly that the Comptroller was under no duty to make findings of fact, and that review was to be based on the full record before the Comptroller when he made his decision. In affirming the Comptroller's approval, the court said,

> "There may exist some confusion as to the reasoning process employed by the Comptroller in reaching his decision, but there is sufficient explanation in the administrative record . . . to obviate the need for further explanation . . . ."

We agree that there would be enough support in the record concerning possible inadequacy and inaccessibility of present banking facilities in Chelmsford to provide a rational basis for the Comptroller's approval.[2] But the record leaves us in doubt whether the Comptroller took Massachusetts' statutory standard into account. Under 5 U.S.C. § 706(2)(A), a reviewing court must be satisfied that the Comptroller's decision was "in accordance with law." While a

[2] We find no merit in the argument that the Comptroller is bound by earlier decisions of the Massachusetts Board of Bank Incorporation refusing to permit a state bank to operate a branch in Chelmsford. The Comptroller is not bound by a state agency's interpretation of the state's statutes. *First National Bank of Southaven* v. *Camp,* 471 F.2d 1322, 1325-26 (5th Cir. 1973); *Union Savings Bank* v. *Saxon,* 335 F.2d 718, 723 (2d Cir. 1964).

We note further that the Massachusetts courts have held that state agency decisions concerning "inadequacy" are "political questions" and non-reviewable. *First National Bank* v. *Board of Bank Incorporation,* ___ Mass. ___, 280 N.E.2d 400 (1972); *Natick Trust Co.* v. *Board of Bank Incorporation,* 337 Mass. 615, 151 N.E.2d 70 (1958).

decision favorable to Middlesex Bank would not be arbitrary or capricious on this record, neither would one turning down its request for a new branch. It thus becomes crucial to determine whether the relevant legal standard was applied.

At the hearing the applicant bank and its opponent made reference to the Massachusetts statutory standard, but the Comptroller's subordinates later made no reference to it in the written recommendations and reports which formed the basis of the Comptroller's action. More troublesome, it is by no means clear from the tenor of their official remarks that the materiality of the state standard was understood. Indeed, portions of certain reports suggest the contrary. For example, in response to a question in a U.S. Treasury form whether under the state's branch banking laws the applicant could legally establish a bank, federal banking officials simply answered "Yes". Given the fact that virtually all of the hearing had been devoted to whether or not applicant could qualify under state law, this response is so meager as to suggest that respondents did not grasp the nature of the legal claim. Both sides call to our attention portions of reports indicating either that there were already too many banks in Chelmsford or, contra, that there was room for appellee. But the point is not whether there is support in the record for the Comptroller's decision—we believe there would be, assuming he applied the correct legal standard. The point is whether or not the Comptroller reviewed the facts in light of the Massachusetts statute law. Under 12 U.S.C. § 36(c)(2), the Comptroller had a duty to focus on the controlling state statute; and the contesting banks were entitled to have the application measured against this legal standard. Otherwise their arguments in opposition were an exercise in futility from the start.

We do not hold the Comptroller to any particular form of record; a conclusory statement[3] or even a subordinate's report directed to the relevant standard might have satisfied us that the appropriate legal standard had been recog-

nized and applied. But here there is not only an absence of affirmative recognition of Massachusetts law, there are indications on the face of the record that those with the responsibility for guiding the Comptroller may not have considered it at all. We think the present record to be so deficient as to "frustrate effective judicial review." *Camp* v. *Pitts, supra* at 142-43. Until the Comptroller makes it clear whether or not the applicable state standard was taken into account in rendering his decision, it cannot be determined that his approval was "in accordance with law."

It can be argued, of course, that since the Comptroller can validate his decision by a piece of paper, remand is time consuming ritualism. And it is true that the Comptroller's good faith representation of compliance will effectively end judicial review. But were we to affirm on the present record, we would abdicate a judicial responsibility; and we will not assume that a senior administrative official such as the Comptroller will take the easy course of certifying that he considered the state standard if such were not the case. Moreover, we assume that to avoid this problem in future cases, administrative action will be taken to ensure that the requisite consideration of state statute law can be determined from the record.

We vacate and remand for the district court to determine from the Comptroller, following the limited procedures outlined in *Camp* v. *Pitts, supra* at 142-43, whether or not the Comptroller took into account the relevant state legal standard. If such was the case, his approval of the application should be sustained. If it should appear that this standard was not taken into account, the district court shall conduct such further proceedings and enter such orders as it deems appropriate.

Remanded for proceedings in accordance herewith.

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[3] *Cf. Dorszynski* v. *United States*, 418 U.S. 424 (1974).

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 73-1355-M

THE FIRST BANK AND TRUST COMPANY
v.
JAMES E. SMITH, Comptroller of the Currency
of the United States,
and
MIDDLESEX BANK, N.A.

MEMORANDUM
April 12, 1976

MURRAY, D.J. This case came on for hearing on the defendant Comptroller's renewed motion for summary judgment, following the vacation by the Court of Appeals for the First Circuit of this court's earlier allowance of a similar motion for summary judgment and the remand of the case for further proceedings here. 509 F.2d 663 (1st Cir. 1975).[1]

Following remand, the Comptroller filed with this court a renewed motion for summary judgment to which was annexed an Opinion of the Comptroller of the Currency on Remand of the Application of Middlesex Bank.[2] The sole

[1] In its original memorandum and order, the court ruled on the motions for summary judgment of both defendants. The present motion for summary judgment has been filed by the defendant Comptroller of the Currency alone.

[2] This opinion states:

> In passing on branch, charter and similar applications, the Comptroller of the Currency has, as a supervisory matter, always considered whether such applications will serve and fulfill a legitimate banking need of a community or whether the existing facilities in the community adequately meet the public needs and convenience, thereby negating need for another facility in the area—whether or not such criterion is imposed by state statute upon state banking authorities in the particular state involved. This factor was considered in connection with the present application.

Comptroller's Opinion at 2. After recapitulating the factual findings developed in the administrative record prior to the Comptroller's original approval, the opinion further states:

> In sum, the Comptroller is satisfied, and therefore finds that the existing commercial banking facility in applicant's proposed service area is inadequate for the public convenience; that the establishment of the proposed branch would provide added convenience to the Chelmsford public; and that the Comptroller's preliminary approval of the application of Middlesex Bank, N.A. to establish and operate a branch in the Purity-Chelmsford Shopping Center, in the town of Chelmsford, Massachusetts, should be and is reaffirmed.

Id. at 4.

issue on defendant's motion for summary judgment is whether this new opinion satisfies the mandate of the court of appeals. The court believes it does.

The plaintiff argues that the court of appeals' mandate can only be met by reopening the administrative proceedings, and or by testimony. There is some support in the opinion of the court of appeals for plaintiff's position:

> We do not hold the Comptroller to any particular form of record; a conclusory statement or even a subordinate's report directed to the relevant standard *might have satisfied* us that the appropriate legal standard had been recognized and applied.

509 F.2d at 666 (footnote omitted) (emphasis added). This language implies that, while a certification such as the Comptroller's Opinion might once have sufficed, it no longer will do so at this stage of the proceedings. However, other language in the opinion of the court of appeals seems to negate this implication:

> It can be argued, of course, that since the Comptroller can validate his decision by a piece of paper, remand is time consuming ritualism. And it is true that the Comptroller's good faith representation of compli-

> ance will effectively end judicial review. . . . [W]e will not assume that a senior administrative official such as the Comptroller will take the easy course of certifying that he considered the state standard if such were not the case.

Id. at 666-67. This language seems to contemplate a procedure such as was followed here, i.e., that the Comptroller would file a paper certifying that the state standard had been considered. While the issue is not entirely free of doubt, the court concludes that the latter is the correct interpretation of the court of appeals' mandate. Thus, the opinion of the Comptroller, who held the office when the case was first heard in the district court, meets the requirements of the mandate and the Comptroller is entitled to summary judgment.

This conclusion is bolstered by the direction to this court to follow the procedures outlined in *Camp* v. *Pitts*, 411 U.S. 138 (1973). In *Camp* v. *Pitts*, the Supreme Court ruled that, where the administrative record is so deficient as to frustrate effective judicial review under 5 U.S.C. § 706(2)(A), the proper procedure is to obtain from the agency additional explanation of the reasons for its decision, either through affidavits or testimony. *Id.* at 142-43. *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420-21 (1971). Here, the Comptroller's Opinion provides such additional explanation. The explanation is not in the form of affidavit or testimony, but in setting out this requirement *Camp* cited *Overton Park* in which it was said that "formal findings" by the appropriate administrative official could cure the defect in the administrative record. The court holds that the Comptroller's Opinion is the type of document contemplated in *Camp* and *Overton Park*.

It is true that "Such an explanation will, to some extent, be a '*post hoc* rationalization' and thus must be viewed critically". *Overton Park*, *supra* at 420. Even thus viewed,

the Comptroller's Opinion satisfies this court that the Comptroller had in mind the state standard when he approved the application of Middlesex Bank. Further, some of the language in the Comptroller's Opinion (see the second quotation from the Comptroller's Opinion, footnote 2 *supra*) is prospective; i.e., the Comptroller's Opinion not only states that the state standard was applied in considering the original application, but also that, explicitly considering the state standard anew, the approval of the application is reaffirmed. This fully demonstrates that the Comptroller's decision is in accordance with law.

In conclusion, the Comptroller's Opinion meets the requirements of the mandate and demonstrates that the approval of the Middlesex Bank's application was and is in accordance with law and meets the standard of review applied by the district court under 5 U.S.C. § 706(2)(A).

(s) FRANK J. MURRAY
United States District Judge

Dated April 12, 1976

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 76-1298

THE FIRST BANK AND TRUST COMPANY,

PLAINTIFF, APPELLANT,

v.

JAMES E. SMITH, COMPTROLLER, ETC., ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK J. MURRAY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Michael T. Putziger, with whom *Roche, Carens & DeGiacomo* was on brief for appellant and opposition to motion for summary affirmance.

Leonard Schaitman, Attorney, Department of Justice, with whom *John M. Rogers*, Attorney, Department of Justice, were on motion for summary affirmance for Comptroller of the Currency, appellee.

September 27, 1976

Per Curiam. This action challenging a decision by the Comptroller of the Currency approving an application of defendant-appellee, Middlesex Bank, a national bank, to establish a branch bank in Chelmsford, Massachusetts, first came to us on appeal from the district court's grant of summary judgment in favor of the defendants. *First Bank and*

Trust Co. v. *Smith*, 509 F.2d 663 (1st Cir. 1975). We vacated the judgment and remanded for the district court to determine whether the Comptroller of the Currency took into account the applicable state standard, as required by 12 U.S.C. § 36(c)(2), in approving the application for a branch bank. Under that section, the Comptroller of the Currency may authorize a national bank to open a new branch only if its "establishment and operation are at the time authorized to State banks by the statute law of the State in question . . . and subject to the restrictions as to location imposed by the law of the State on State banks." Massachusetts law allows state banks to establish branch offices if a city's or town's banking facilities are "inadequate for the public convenience." M.G.L. c. 172, § 11. Although the record contained enough to support the Comptroller's approval generally, it did not indicate that the Comptroller had focused on the relevant Massachusetts standard. We remanded for the limited purpose of finding out if the Comptroller had taken into account the applicable state standard. *Camp* v. *Pitts*, 411 U.S. 138, 142-43 (1973).

On remand, the Comptroller issued a supplemental opinion specifically noting the relevant requirement of Massachusetts law and stating that he had reexamined the record and reaffirmed his approval. The Comptroller went on to state that the factor of whether or not existing facilities in the community adequately met the public needs and convenience "was considered in connection with the present application." After summarizing earlier findings relating to banking services and facilities in the affected area, on which his original order was based, the Comptroller stated that he was satisfied that "the existing commercial banking facility in applicant's proposed service area is inadequate for the public convenience and that the proposed branch would provide added convenience to the Chelmsford pub-

lic." Having issued the supplemental opinion, the Comptroller then renewed his motion for summary judgment. The district court granted the motion, finding the supplemental opinion satisfied the mandate of this court on remand and met the standard of review under 5 U.S.C. § 706 (2)(A). We agree with the district court and therefore affirm.

First Bank and Trust Co.'s (First Bank's) primary contention is that the Comptroller's supplemental opinion is merely a "post hoc rationalization", *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), of the earlier decision and does not reveal that his predecessor, the acting Comptroller, had considered the relevant Massachusetts statute in reviewing the application of Middlesex Bank. Stressing the Comptroller's failure to certify that his predecessor had actually focused on M.G.L. c. 172, § 11, First Bank argues that the Comptroller's reassurance is based only on an asserted practice of "always" considering "whether the existing facilities in the community adequately meet the public needs and convenience . . . whether or not such criterion is imposed by state statute. . . .' But we think the Comptroller's assertion that the relevant standard "was considered" coupled with his reiterated approval of the application in light of the Massachusetts statute is sufficient to establish that his decision was "in accordance with law". 5 U.S.C. § 706(2)(A).

First Bank's second argument, that the district court erred in denying First Bank's motion to depose subordinates of the Comptroller, misconceives the limited nature of our remand. In directing the district court to determine from the Comptroller whether he had considered the relevant state standard, we recognized that the Comptroller's "good faith representation of compliance will effectively end judicial review." *First Bank and Trust Co.* v. *Smith*,

509 F.2d 663, 667 (1st Cir. 1975); *see Camp* v. *Pitts, supra.* The testimony of subordinates relative to the Comptroller's initial decision was not contemplated and is not necessary to effective judicial review in the absence of circumstances not present here indicating that the Comptroller's representation of compliance is in bad faith. *See South Terminal Corp.* v. *Environmental Protection Agency,* 504 F.2d 646, 675 (1st Cir. 1974).

Affirmed.

APPENDIX E

OPINION OF THE COMPTROLLER OF THE CURRENCY ON REMAND OF THE APPLICATION OF MIDDLESEX BANK, N.A., TO ESTABLISH AND OPERATE A BRANCH IN THE PURITY-CHELMSFORD SHOPPING CENTER, IN THE TOWN OF CHELMSFORD, MIDDLESEX COUNTY, MASSACHUSETTS.

April 24, 1975

On April 19, 1973, the Comptroller of the Currency, acting pursuant to 12 U.S.C. § 36(c), approved an application of Middlesex Bank, National Association, of Burlington, Massachusetts, to establish and operate a branch in the Purity-Chelmsford Shopping Center, in the town of Chelmsford, Massachusetts. Litigation challenging the Comptroller's approval was brought in the United States District Court for the District of Massachusetts, by a competing bank, First Bank and Trust Company, of Chelmsford, Massachusetts.

On May 13, 1974, the District Court entered an opinion granting the Comptroller's motion for summary judgment and determined that:

> * * * a survey and analysis of the administrative record will reflect that the Comptroller did consider and apply the relevant state statute * * * and that his approval of the branch bank for Chelmsford was for a town referred to in evidence as having "banking facilities" * * * inadequate for the public convenience."

(Slip Op. p. 5.)

The Court also noted that:

> The Comptroller must be allowed discretion in the interpretation of words of a state statute which are susceptible of several reasonable interpretations and

> which have not received an authoritative interpretation from a state court.
> (*Ibid.*)

Plaintiff First Bank and Trust Company appealed the District Court decision and on January 3, 1975, the Court Appeals for the First Circuit vacated the District Court's decision and remanded the case for further proceedings, directing the District Court "to determine from the Comptroller * * * whether or not the Comptroller took into account the relevant state legal standard."

The Massachusetts law referred to by the Court is Chapter 172 § 11 of the Commonwealth of Massachusetts General Laws, which permits a state bank to establish a branch office in a city or town "* * * having banking facilities which, in the opinion of the board, are inadequate for the public convenience."

The Comptroller has reexamined the record on the application and now reaffirms his approval.

In passing on branch, charter and similar applications, the Comptroller of the Currency has, as a supervisory matter, always considered whether such applications will serve and fulfill a legitimate banking need of a community or whether the existing facilities in the community adequately meet the public needs and convenience, thereby negating need for another facility in the area—whether or not such criterion is imposed by state statute upon state banking authorities in the particular state involved. This factor was considered in connection with the present application. The Comptroller notes, in particular:

> (1) Protestant First Bank and Trust Company is the only commercial banking facility located within the applicant bank's proposed service area (the only other banking facility being a savings bank which provides lesser banking services) (see Comptroller's administrative record, pp. 13, 19, 168-9, 183);

(2) The proposed branch facility promises to offer more extensive loan services than the existing bank (with a loan-to-deposit ratio of 25 percent) does (Comptroller's administrative record, pp. 22-24); and

(3) Present customers of Middlesex Bank, N.A., travel to the next town to the bank's nearest facility which is inconvenient to them because of its distance (4 miles away) and overcrowded, understaffed facilities (small lobby and four teller stations), rather than use the only existing commercial banking facility in Chelmsford (Comptroller's administrative record, pp. 8, 9, 12, 15, 20, 157, 175).

The Comptroller's record clearly notes these facts and the Comptroller's staff often make reference to these facts in their analyses and recommendations as they appear in the record.

The Comptroller is persuaded that the only commercial facility located within the service area proposed by the applicant is not adequate for the public convenience in Chelmsford.

The advent of the applicant's branch into the area will increase the public convenience by (1) providing a more conveniently located office for its existing customers; (2) providing another conveniently located banking facility for the area's public in general; (3) providing a wider array of banking services for the public convenience; and (4) compelling the existing commercial facility to offer a more responsive array of banking services to the public in the face of competition from the new banking facility.

In sum, the Comptroller is satisfied, and therefore finds that the existing commercial banking facility in applicant's proposed service area is inadequate for the public convenience; that the establishment of the proposed branch would provide added convenience to the Chelmsford public; and that the Comptroller's preliminary approval of the

application of Middlesex Bank, N.A. to establish and operate a branch in the Purity-Chelmsford Shopping Center, in the town of Chelmsford, Massachusetts, should be and is reaffirmed.

(s) JAMES E. SMITH
JAMES E. SMITH
Comptroller of the Currency

Dated: April 24, 1975

APPENDIX F

12 U.S.C. §36 provides in material part:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

Mass. Gen. Laws, ch. 172, §11 provides in material part:

Branches; establishment; main office; change of location

After such notice and hearing as the board may prescribe, a trust company may, with the approval of the board, establish and operate one or more branch offices in the city or town where its principal office is located, or in any other city or town in the same county having no commercial banking facilities or having banking facilities which, in the opinion of the board, are inadequate for the public convenience.

12 C.F.R. PART 5—Supplemental Application Procedures for Charters, Branches, Mergers and Relocations

Sec.

AUTHORITY: The provisions of this Part 5 issued under 12 U.S.C. 1 et seq.; 12 U.S.C. 27, 30, 36, and 1828(c).

SOURCE: The provisions of this Part 5 appear at 36 F.R. 6888, Apr. 10, 1971, unless otherwise noted.

§ 5.1 Scope of part.

This part contains procedures by which the Comptroller of the Currency may reach informed decisions with respect to applications to charter national banks, to establish branches of national banks, to merge or consolidate with or purchase the assests of another bank where the resulting bank is a national bank, or to relocate offices of national banks, and in such cases as the Comptroller in his sole discretion shall deem proper. These procedures provide a method by which all persons interested in the subject matter of such applications may present their views. Nothing contained herein shall be construed to prevent interested

persons from presenting their views in a more informal manner when deemed appropriate by the Comptroller, his deputy, or by the Regional Administrator of National Banks, or to prevent the Comptroller or the Regional Administrator from conducting such other investigation as may be deemed appropriate.

§ 5.2 Notice of filing of application.

(a) Applications described in §5.1 of this Part shall be filed as provided in 12 CFR Part 4.

(b) By publication. Except in the case of proposed transactions where notice by publication is governed by statute, the applicant shall, within 15 days after the Regional Administrator of National Banks shall have notified the applicant in writing that an application has been accepted for filing, publish one time in a newspaper of general circulation in the community in which the applicant's head office is located and in a newspaper of general circulation in the community in which the applicant proposes to engage in business a notice containing the name of the applicant or applicants, the subject matter of the application, and the date upon which the application was filed. Immediately thereafter, the applicant shall furnish the Regional Administrator with a tear sheet or clipping evidencing such publication.

(c) By the Regional Administrator. The Regional Administrator shall give timely notice to the State official who supervises State commercial banks in the State in which the applicant is or will be located, and to any other person requesting in writing notice of the date on which an application was filed. The Regional Administrator shall solicit, in whatever manner he deems appropriate, comments from each bank which the Regional Administrator believes in his sole discretion might be affected by or have an interest in the pending application.

§ 5.3 Public file.

(a) *Contents.* The public file in each case shall consist of the application with supporting data and supplementary information, with the exception of material deemed by the Regional Administrator to be confidential, such as trade secrets normally not available through commercial publication. In addition, the public file shall contain all data and information submitted by interested persons in favor of or in opposition to such application, excluding any material deemed by the Regional Administrator to be confidential. The Regional Administrator or his designee shall not deem information confidential for purposes of the two immediately preceding sentences unless the person submitting the information requests that such information be deemed confidential. All factual information contained in any field investigation report made by a national bank examiner shall also be made part of the public file, unless deemed confidential by the Regional Administrator.

(b) *Availability to protesting and other interested persons.* The public file shall be available for inspection in the Office of the Regional Administrator upon written request from a protesting person and to such other persons as the Regional Administrator shall deem in his discretion to have a direct interest therein during such periods of time as the Regional Administrator shall prescribe. No documents in the public file may be removed from the Regional Administrator's office by persons other than members of the Comptroller's staff. Photocopies may be made available, on request, to protesting and other interested parties. The charge for such copies shall be made in accordance with a written schedule maintained by the Regional Administrator.

§ 5.4 Written comments and requests for an opportunity to be heard.

Within 10 days after the notice by publication described in §5.2(b) any interested person may submit to the Regional Administrator written comments concerning the application and/or a written request for an opportunity to be heard before the Regional Administrator or his designee. This time may be extended by the Regional Administrator in his sole discretion if the applicant has failed to file all required supporting data in time to permit review by interested persons or for other extenuating circumstances. In the absence of a request, the Regional Administrator or the Comptroller of the Currency, when either believes it to be in the public interest, may order a hearing to be held.

§ 5.5 Place of hearing.

Persons submitting a request described in §5.4 shall be given an opportunity to be heard in the city where the Office of the Regional Administrator is located. The Comptroller of the Currency, in any matter, reserves the right to conduct hearings at any location he deems to be appropriate.

§ 5.6 Date of hearing.

An opportunity to be heard shall be given as soon as practicable after requested or ordered.

§ 5.7 Notice of hearing.

(a) *Contents.* The Regional Administrator, when notifying interested persons of the scheduling of an opportunity to be heard, shall set forth in the notice of the subject matter of the application and the date, time, and place at which the opportunity to be heard shall be afforded.

(b) *To whom sent.* The notice described in §5.7(a) shall be sent to the person or persons requesting the hearing, the applicant, and to other interested persons who have sent written comments to the Regional Administrator.

§ 5.8 Attendance at hearing.

Each person who wishes to be heard shall notify the Regional Administrator within 5 days after the date of the notice described in §5.7 of his intention to attend and shall submit the number and names of witnesses he wishes to be present.

§ 5.9 Presiding officer.

When an opportunity to be heard is being afforded, the presiding officer shall be the Regional Administrator, his designee, or such other person as may be named by the Comptroller of the Currency. The presiding officer shall have the authority to appoint a panel to assist him.

§ 5.10 Hearing rules.

(a) *Order of presentation*—(1) *Opening statements.* The applicant and each other participant may make opening statements of a length within the discretion of the presiding officer. Such opening statements should concisely state what the participant intends to show. The applicant shall have the opportunity to present his statement first.

(2) *Applicant's presentation.* Following the opening statements, the applicant shall present his data and materials, oral or documentary.

(3) *Protestant's presentation.* Following the applicant's presentation, the persons protesting the application shall present their data and materials, oral or documentary. The protestants may agree, with the approval of the presiding officer, to have one of their members make their presentation.

(4) *Other interested persons.* Following the evidence of the applicant and the protestant, the presiding officer in his discretion may recognize other interested persons who may present their views with respect to the application under consideration.

(5) *Summary statements.* After all the above presentations have been concluded, the participants before the panel may make short and concise summary statements reviewing their position. The applicant shall present his concluding summary statement first.

(b) *Witnesses.* The obtaining and use of witnesses is the responsibility of the parties. All witnesses will be present on their own volition, but any person appearing as a witness may be subject to questioning by any participant, by the presiding officer, or by any member of the panel. The refusal of a witness to answer questions may be considered by the Comptroller in determining the weight to be accorded the testimony of that witness. Witnesses shall not be sworn.

(c) *Evidence.* The presiding officer shall have the authority to exclude data or materials which he deems to be improper or irrelevant. Formal rules of evidence shall not be applicable to these hearings. Documentary material must be of a size consistent with ease of handling, transportation, and filing, and copies must be provided for each participant. While large exhibits may be used during the hearing, copies of such exhibits must be provided by the party in reduced size for submission as evidence. Two copies of all such documentary evidence shall be furnished to the Regional Administrator, and one copy shall be furnished to each other person represented at the proceeding.

(d) *Procedural questions.* The Regional Administrator, presiding officer, or any designated member of the assisting panel shall determine all procedural questions not governed by this Part. The Regional Administrator and the presiding officer shall each have the authority to limit the number of witnesses to be used by any part, and to impose such time limitations as he shall deem reasonable.

(e) *Transcript.* A transcript of each proceeding shall be arranged for by the Comptroller's office, with all expenses of such service, including the furnishing of two copies of

the transcript to the Regional Administrator, being borne by the person or persons requesting the opportunity to be heard, except for hearings ordered by the Comptroller's office, where the applicant will bear the expense of furnishing transcripts of the record.

(f) *The record.* The public file described in §5.3 shall automatically be deemed a part of the record of these proceedings as well as all evidence submitted pursuant to §5.10 (c) and the transcript described in §5.10(e).

§ 5.11 Closing of the public file.

If requested by any participant, the public file shall remain open for 5 days following receipt of the transcript by the Regional Administrator during which time the applicant and protestants may submit additional written statements. A copy of any statement so submitted during this period of time shall also be sent simultaneously to the other persons represented at the hearing.

§ 5.12 Retained authority.

The Comptroller may adopt such different procedures as he deems necessary and reasonable in acting upon any particular application.

§ 5.13 Comptroller's decision.

The applicant and all persons so requesting in writing shall be notified of the final disposition of the application by the Comptroller of the Currency.

§ 5.14 Computation of time

In computing any period of days provided for in this part, the day of the act from which the period begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. As used in this section, "legal holiday" means a day on which the office of the appropriate Regional Administrator remains closed.

No. 76-881

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE FIRST BANK AND TRUST COMPANY, PETITIONER

v.

ROBERT BLOOM, ACTING COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the Comptroller of the Currency failed adequately to explain his decision granting a competitor's application to establish a branch bank in the State of Massachusetts.

The National Bank Act subjects national banks to the same branch location restrictions that state law imposes on state banks. 12 U.S.C. 36(c). Massachusetts law limits bank branches to cities or towns in the same county "having no commercial banking facilities or having banking facilities which * * * are inadequate for the public convenience." Ann. L. Mass., C. 172, §11(a) (1970). One of the respondents here, a national bank within the State of Massachusetts, petitioned the

Comptroller of the Currency to establish a branch bank within Massachusetts. Following a hearing at which petitioner protested, the Comptroller granted the application. Petitioner then brought suit in the United States District Court for the District of Massachusetts, which granted summary judgment for the Comptroller and the successful applicant (Pet. App. 17-23).

Petitioner appealed, and the court of appeals vacated the district court's decision and remanded the case to the district court, stating (Pet. App. 27):

> We agree that there would be enough support in the record concerning possible inadequacy and inaccessibility of present banking facilities in Chelmsford to provide a rational basis for the Comptroller's approval. But the record leaves us in doubt whether the Comptroller took Massachusetts' statutory standard into account.

The court of appeals therefore remanded to the district court for the single purpose of determining whether the Comptroller had taken into account the relevant state legal standard (Pet. App. 29).

On remand, the government filed a supplemental opinion of the Comptroller, indicating that Massachusetts law had been taken into account and reaffirming the finding that the banking facilities in the town in which the branch was to be established were "inadequate for the public convenience" within the meaning of the Massachusetts statute (see Pet. App. 38-41). The district court accordingly entered judgment for the defendants (Pet. App. 30-33).

Petitioner appealed again. The court of appeals affirmed *per curiam* (Pet. App. 34-37), holding that the Comptroller's assertion in his supplemental opinion that the relevant

state standard "was considered," coupled with his reiterated approval of the application in light of the Massachusetts statute, was sufficient to establish that his decision was "in accordance with law" as required by 5 U.S.C. 706(2)(A) (Pet. App. 36).[1]

The judgment of the court of appeals is correct and does not warrant review by this Court. Both the district court and the court of appeals have at all times recognized that there is "enough support in the record concerning possible inadequacy and inaccessibility of present banking facilities in Chelmsford to provide a rational basis for the Comptroller's approval" (Pet. App. 27). The court of appeals remanded only because the administrative record lacked an explicit statement that the Comptroller had considered Massachusetts law. The court of appeals contemplated that "the Comptroller's good faith representation of compliance will effectively end judicial review" (Pet. App. 29).

Petitioner contends that the Comptroller's supplemental opinion "does not in any way provide an explanation of the original agency determination" (Pet. 15). Such an explanation was not necessary, for the administrative record itself was sufficient to support the Comptroller's decision. But the supplemental findings of the Comptroller, which were based upon a record that included

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[1]The court of appeals also affirmed the district court's denial of petitioner's request for further discovery (Pet. App. 36, 37):

> The testimony of subordinates relative to the Comptroller's initial decision was not contemplated and is not necessary to effective judicial review in the absence of circumstances not present here indicating that the Comptroller's representation of compliance is in bad faith. *See South Terminal Corp.* v. *Environmental Protection Agency*, 504 F. 2d 646, 675 (1st Cir. 1974).

an extensive field investigation and a public hearing, did explicitly set forth the basis for the Comptroller's conclusion that the Massachusetts state standard was met.[2] The reaffirmed decision, combined with detailed findings and a complete administrative record, amply comports with the requirements of *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402.[3] See *Bank of Commerce of Laredo* v. *City National Bank of Laredo*, 484 F. 2d 284, 288 (C.A. 5), certiorari denied, 416 U.S. 905; see also *City National Bank* v. *Smith*, 513 F. 2d 479, 484-485 (C.A. D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.

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[2]Petitioner contends that the Comptroller made a "substantial factual error" by incorrectly referring to petitioner as "the only existing commercial facility in Chelmsford" (Pet. 15). The Comptroller's meaning is clear, however, since at three other points in the supplemental opinion he correctly refers to petitioner as the only existing commercial facility located within the applicant bank's proposed service area within Chelmsford (Pet. App. 39-40). The other outlets petitioner refers to (Pet. 15) were located outside this service area.

[3]This Court held in *Citizens to Preserve Overton Park* that requiring the administrative officials who participated in the decision to give testimony explaining their action "is usually to be avoided" (401 U.S. at 420) and that in appropriate cases "post hoc" findings would provide an acceptable basis for review (401 U.S. at 419-421). See also *Camp* v. *Pitts*, 411 U.S. 138.